01-10868

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IN THE

SUPREME COURT OF THE UNITED STATES

NO: _____

CHARLES KENNETH FOSTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of the
State of Florida

PETITION FOR WRIT OF CERTIORARI

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25 pp

QUESTIONS PRESENTED FOR REVIEW

CAPITAL CASE
QUESTION I:

The Florida Supreme Court erred in upholding a trials court's denial of Defendant's 3.850 Motion for Post Conviction Relief without a hearing based upon his alleged violation of his right to an impartial jury.

The Trial Court and State Attorney systematically excluded pregnant women or women with small children from the venire without Petitioner's knowledge or consent. (Contrary to the V, VI and XIV Amendments to the United States Constitution and Article I, Section 9 and 16 to the Constitution of the State of Florida).

CAPITAL CASE
QUESTION II:

The Florida Supreme Court engaged in a constitutionally flawed harmless error analysis in the Defendant's previous Appeal. **Foster v. State**, 654 So.2d 112 (Fla. 1995). (Appendix A-2) (Contrary to the V and VI Amendments to the United States Constitution.)

CAPITAL CASE
QUESTION III:

The Florida Supreme Court erred in upholding the trial court's denial

of Defendant's 3.850 Motion for post-conviction relief. Claims D., Cruel and Unusual Punishment - 23 years (now 26 years) on Death Row. (Contrary to the V, VIII and XIV Amendment to the United States Constitution and Article I, Sections 9 and 17 to the Constitution of the State of Florida.)

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2. THE FLORIDA SUPREME COURT ENGAGED IN A CONSTITUTIONALLY FLAWED HARMLESS ERROR ANALYSIS IN THE PETITIONER'S PREVIOUS APPEAL. **FOSTER V. STATE**, 654 So.2d 112 (Fla. 1995). (CONTRARY TO THE V AND VI AMENDMENTS TO THE UNITED STATES CONSTITUTION)

3. THE FLORIDA SUPREME COURT ERRED IN DENYING PETITIONER'S 3.850 MOTION FOR POST-CONVICTION RELIEF. CLAIMS D - CRUEL AND UNUSUAL PUNISHMENT- 23 YEARS ON DEATH ROW. (CONTRARY TO THE V, VIII AND XIV AMENDMENTS TO THE UNITED STATES CONSTITUTION)

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The opinion of the Florida Supreme Court that gives rise to this Petition appears as **Charles Kenneth Foster vs. State**, 810 So.2d 910 (Fla. 2002). It is submitted in Appendix A-1. The decision was rendered February 14, 2002.

JURISDICTION

Petitioner, Charles Kenneth Foster, filed a direct appeal to the Florida Supreme Court from denial of his Motion for Post-Conviction Relief (Fla. Rule 3.850). That Court rejected the appeal by its decision of February 14, 2002. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within ninety (90) days of the rendition order by the Florida Supreme Court.

Jurisdiction of this Court is involved pursuant to Supreme Court Rule 10 (c):

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

STATUTES INVOLVED IN THIS CASE

Florida Statute 40.01(1) 1975 (Appendix 4):

> Grand and petit jurors shall be take from the male and female persons over the age of twenty-one years, who are citizens of this state and who have resided in this state for one year and in their respective counties for six months and who are fully qualified electors of their respective counties; provided, however, that expectant mothers and mothers with children under eighteen years of age, upon their request, shall be exempted from grand and petit jury duty.

STATEMENT OF THE CASE

A summary of the facts at trial (appears in 369 So.2d 928 (Fla. 1979), (Appendix A-5) revealed the following:

Anita Rogers, 20 years of age, and Gail Evans, 18 years of age, met Petitioner and the victim, Julian Lanier at a bar. They knew Petitioner, but the victim was a stranger.

The girls, after a discussion, agreed to go to the beach or somewhere else to drink and party with the men. The victim bought whiskey and cigarettes, after which the four of them left in the victim's Winnebago camper. The Petitioner and the girls had planned for Gail to have sex with the victim and make some money. Gail parked the vehicle in a deserted area and, after some conversation concerning compensation, the victim and Gail began to disrobe.

Petitioner suddenly began hitting the victim and accusing him of taking advantage of his sister. (Gail was not his sister). Petitioner then held a knife to the victim's throat and cut his neck, causing it to bleed profusely. They dragged the victim from the trailer into the bushes where they laid him face down and covered him with pine branches and leaves. They could hear the victim breathing so Petitioner took a knife and cut the victim's spine.

The girls and Petitioner then drove off in the Winnebago and found the victim's wallet underneath a mattress. The Petitioner and the girls split the money found in the wallet and left the vehicle parked in the parking lot of a motel.

The next morning, Anita Rogers went to the Sheriff's Department and reported what had happened. She had been committed to a mental institution when she was 13 years of age and was not charged with any offense in this case.

Petitioner was charged by an indictment with the offenses of first-degree murder and robbery.

The Petitioner testified at trial and during his description of the events of the evening, testified as follows:

> "I reckon I'll just cop out. I have done it, killed him deader than hell. I ain't going to set up here, I am under oath and I ain't going to tell no fucking lies. I will ask the Court to excuse my language. I am the one that done it. They didn't have a damn thing to do with it. I was premeditated and I intended to kill him. I would have killed him if he hadn't had no money and I know I never told you about it, but I killed him."

The jury returned verdicts finding Petitioner guilty of robbery, premeditated murder in the first degree, and felony murder. After the sentence hearing, the jury returned an advisory verdict unanimously recommending that Petitioner receive the death penalty.

Thereafter, Petitioner's case was subject to several post-conviction applications and both State and Federal appeals. (Appendix 1). The decision of **Foster v. State**, 614 So.2d 455 (Fla. 1992) (Appendix A-6)remanded the case to enter a new sentencing order.

On August 12, 1993, Petitioner was again sentenced to death, and the Florida Supreme Court affirmed the sentence on June 16, 1995 and Rehearing was denied June 19, 1995. See **Foster v. State,** 654 So.2d 112 (Fla. 1995). (Appendix A-2) ***Certiorari*** was denied by the United States Supreme Court on October 10, 1995. **Foster v. Florida**, 516 U.S. 920, 116 S.Ct. 314, 133 L.Ed.2d 217 (1995).

Petitioner was appointed registry counsel on September 9, 1998, and an investigator, Michael Glantz, was appointed on December 12, 1998.

An Amended 3.850 Motion for Post-Conviction Relief was filed September 7, 1999. The State responded July 7, 2000.

Petitioner conceded that his Amended 3.850 Ground D, (Excerpts Appendix A-7) Petitioner's confinement on Death Row for over 23 years constitutes cruel and unusual punishment and Ground E , Electric Chair - cruel and unusual punishment had been resolved against Petitioner since the filing of his 3.850 motion. Ground A, Constitutionally Flawed Harmless

Error was raised for Florida Supreme Court reconsideration for possible Federal review.

However, these issues were preserved for possible Federal review since they involve death issues as applied to a person with severe mental deficiencies (Defendant was diagnosed as having " . . . serious organic problems secondary to head trauma and poor prenatal care," and " . . . organic mental disorders."

Through public records disclosure of the prosecutor's files, Petitioner's investigator, appointed December 12, 1998, obtained a previously undisclosed document of the original venire in his case. The amended 3.850 motion alleged that this document contained prosecution notes of the venire pre-selection process in Bay County. The jury list revealed that women were systematically excluded if they were pregnant or had small children.

It was further alleged that neither Petitioner or his counsel was present at this pre-selection process, no record of the event was made, except the list located ". . .through public records disclosure by current counsel's investigator, Michael Glantz. " Thus, claim was made that there was no documentation of this issue except the State's venire notes. The Trial Court denied Petitioner an evidentiary hearing on this issue. (Appendix 3)

From the Order Denying Post-Conviction Relief, December 27, 2000, Petitioner filed timely Notice of Appeal to the Florida Supreme Court on January 22, 2001. That Court rendered its decision rejecting Petitioner's appeal and original ***habeas corpus*** petition in **Foster v. State**, 810 So.2d 910 (Fla. 2002). (Appendix A-1)

Pursuant to Supreme Court Rule 14 ***certiorari***, the questions sought to be reviewed were raised and passed on by the Courts below as follows:

> **Question I - Violating Right to Impartial Jury**. Raised in Petitioner's State Motion for Post Conviction Relief, (Appendix A-7) Ground 14B filed September 3, 1999, Page 12 - 15. Issue rejected in Trial Courts Order of December 29, 2000. (Appendix A-3) and rejected by the Florida Supreme Court on direct appeal. (Appendix A-1) Presented in Petitioner's Brief on Appeal. (Excerpts Appendix A-8 and Excerpts Appendix A-9)

Question II - Constitutionally Flawed Harmless Error Analysis. Raised in Petitioner's State 3.850 motion filed September 3, 1999. Ground 14A, Constitutionally Flawed Harmless Error Analysis. Page 10 - 12 of Amended Motion for Post-Conviction Relief. (Appendix A-7). Trial Court denied Question in its Order of December 29, 2000. (Appendix A-3), issue rejected by the Florida Supreme Court. (Appendix A-1) and (Excerpts Appendix A-9 presented in Petitioner's Brief on Appeal, Excerpts Appendix A-8)

Question III - Twenty-three (23) years on Death Row - Cruel and Unusual Punishment. Raised in Petitioner's Motion for Post-Conviction Relief Ground 14D, Page 16 - 17 (Appendix A-7), issue rejected in Trial Court's Order of December 29, 2000. (Excerpts Appendix A-3) and rejected by Florida Supreme Court on direct appeal. (Appendix A-1) and

(Excerpts Appendix A-9 presented in Petitioner's Brief on Appeal A-8)

REASONS FOR GRANTING WRIT

CAPITAL CASE
QUESTION I

THE FLORIDA SUPREME COURT ERRED IN DENYING PETITIONER'S 3.850 MOTION FOR POST-CONVICTION RELIEF WITHOUT A HEARING BASED UPON HIS ALLEGED VIOLATION OF HIS RIGHT TO AN IMPARTIAL JURY (CONTRARY TO THE V, VI AND XIV AMENDMENTS TO THE UNITED STATES CONSTITUTION)

Failure of the Trial Court to permit an evidentiary hearing on this issue should have been considered reversible error. The amended 3.850 motion sufficiently alleged that the State's jury notes were not available until the public records review of the State's files by conflict counsel's investigator. Those notes revealed a systematic exclusion of pregnant women or women with young children.

The statute in effect at Petitioner Foster's trial was declared unconstitutional in **Alachua County Court Executive v. Anthony**, 418 So.2d 264 (Fla. 1982). In denying Petitioner's amended 3.850 motion, Trial Judge Sirmons concluded that the **Alachua** case addressed "equal protection" issues and therefore did not ". . .compromise the integrity of the jury." (Appendix A-3) **Alachua** very clearly declares the statute under which Petitioner's female jurors were excluded unconstitutional. Cases cited by the Trial Court or Supreme Court of Florida do not realistically address

the issue presented here. Women were excluded under an unconstitutional statute, and any gender exclusions of that degree violated constitutional equal protection standards to an "impartial jury" under the Sixth Amendment, United States Constitution. Alsc, the Trial Court's "equal protection distinction" does not find support in the United States Supreme Court. In **Batson v. Kentucky**, 106 S.Ct. 1712, 90 L.Ed.2d 69, 476 U.S. 79 (1986) the court held:

> By denying a person participation in jury service on account of his race, the State also unconstitutionally discriminates against the excluded juror. Moreover, selection procedures that purposefully exclude black persons from juries undermine public confidence in fairness of our system of justice. Pp. 1716-1718.
>
> The same equal protection principles as are applied to determine whether there is discrimination in selecting the venire also govern the State's use of peremptory challenges to strike individual jurors from the petit jury.

Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 95 S. Ct. 692 (1975) struck **Louisiana's** jury pool law based upon its exclusion of women (except those who requested to serve).

The Supreme Court held:

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth **698 Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community as

a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over conditioned or biased response of a judge. **Duncan v. Louisiana**, 391 U.S., at 155-156, 88 S. Ct. at 1450-1451. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case... (T)he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly ***531** because sharing in the administration of the justice is a phase of civic responsibility. " **Thiel v. Southern Pacific Co.**, 328 U.S. 217, 227, 66 S.Ct. 984, 90 L.Ed. 1181 (1946) Frankfurter, J., dissenting).

> Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.

The Florida Supreme Court in **McArthur v. State**, 351 So.2d 972 (Fla. 1977) held that F.S. 40.01 (1) did not exclude a constitutionally significant class, in as much as no distinctive quality of parenthood or sex is lost by the exclusion.

Subsequently, however, the Florida Supreme Court in **Alachua County v. Anthony**, 418 So.2d 264 (Fla. 1982) declared F.S. 40.013(4)

unconstitutional based upon its gender-based classification. It is important to note the Court's language in striking down the statute.

> Although section 40.013(4) is not being challenged in this proceeding on Sixth Amendment grounds, we note that courts look with disfavor on broadly drawn automatic exemptions from jury service. In **Duren v. Missouri**, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), the United States Supreme Court declared unconstitutional an exemption available upon request to all women because of their important role in the home and family life. In **Lee v. Missouri**, 439 U.S. 461, 99 S.Ct. 710, 58 L.Ed.2d 736 (1979), the Court ordered that the **Duren** decision be retroactively applied to all juries sworn after the 1975 ruling in **Taylor v. Louisiana**, 419 U.S. 522, 95 S.Ct.692, 42 L.Ed 2d 690 (1975), which set out the basic constitutional guidelines for jury selection.
>
> Our affirmance of the First District Court of Appeal's decision holding this automatic exemption unconstitutional does not mean that individuals, male or female, with child-rearing responsibilities should not be granted an exemption from jury service under the discretionary provisions of section 40.013(6). We expect the trial judges of this state to recognize that one who has the responsibility of caring for small children has a legitimate ground for requesting and receiving an exemption under that section.

CAPITAL CASE
QUESTION II

THE FLORIDA SUPREME COURT ENGAGED IN A CONSTITUTIONALLY FLAWED HARMLESS ERROR ANALYSIS IN THE PETITIONER'S PREVIOUS APPEAL. FOSTER V. STATE, 654 SO.2D 112 (FLA. 1995). (CONTRARY TO THE V AND VI AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This issue included in Petitioner's 3.850 motion was more appropriately addressed in his Petition for ***habeas corpus*** proceeding filed below. If there was legally no evidence of a robbery or felony-murder, then the cold, calculated, premeditated aggravator was misapplied under the harmless error standard and the unconstitutionally applied cold, calculated, premeditated instruction considered harmless by the Florida Supreme Court.

If Petitioner's case had been submitted to a jury without the robbery aggravator and with an appropriate cold, calculated, premeditated instruction, the eight to four death recommendation would likely be favorably different. Likewise, the sentencing judge would be more apt to impose a life sentence without the robbery aggravator or unconstitutional instruction.

Harmless error analysis in a death case essentially means that either the trial judge or Florida Supreme Court engaged in a fact finding mission, ***ie*** their own version of facts (not necessarily those decided by the jury). Accordingly, a determination that based on the court's fact, the case warrants

death although the jury instruction was flawed. Compare **U.S. v. Gaudin**, 515 U.S. 506 (1995), 115 S.Ct. 2310, 132 L.Ed.2d 444 and **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348 (2000), 147 L.Ed. 435.

CAPITAL CASE
QUESTION III

THE FLORIDA SUPREME COURT ERRED IN DENYING PETITIONER'S 3.850 MOTION FOR POST-CONVICTION RELIEF. CLAIMS D. CRUEL AND UNUSUAL PUNISHMENT - 23 YEARS (NOW 26 YEARS) ON DEATH ROW (CONTRARY TO THE V, VIII AND XIV AMENDMENTS TO THE UNITED STATES CONSTITUTION)

The Florida Supreme Court has previously ruled against this claim. The issues were submitted to the Florida Supreme Court for re-consideration and possible future United States Constitutional review.

In **Knight v. State**, 746 So.2d 423 (Fla. 1999) the Florida Supreme Court held:

> Finally, **Knight** claims that to execute him after he has already endured more than two decades on **death row** is unconstitutionally **cruel** and **unusual** punishment. He also argues that Florida has forfeited its right to execute **Knight** under binding norms of international law. Although, **Knight** makes an interesting argument, we find it lacks merit. As the State points out, no federal or state courts have accepted **Knight's** argument that a prolonged stay on **death row** constitutes **cruel** and **unusual** punishment, especially where both parties bear responsibility for the long delay. *See, e.g.*, **White v. Johnson**, 79 F.3d 432 (5th Cir.1996); **State v. Smith**, 280 Mont. 158, 931 P.2d 1272 (1996). We also note that the Arizona Supreme Court recently rejected this precise claim. *See* **State v. Schackart**, 190 Ariz. 238, 947 P.2d 315, 336 (1997) (finding "no evidence that Arizona has set up a scheme prolonging incarceration in order to torture inmates prior to their execution"), ***Cert. Denied***, 525 U.S. 862, 119 S.Ct. 149 L.Ed.2d 122 (1998). Second, we also consider that irrespective of the status of this case, **Knight** has been and will remain incarcerated on death row for his 1980 murder of Officer Burke until that case is finalized. We similarly reject **Knight's** claim under international law.

Unlike **Knight,** however, Petitioner Foster's post-conviction relief was largely successful in obtaining new sentence proceedings due to trial court errors.

Justices Brennan and Marshall in **Glass v. Louisiana**, 105 S.Ct. 2159, 85 L.Ed.2d 514, 471 U.S. 1080 (1985) in their dissent from denial of ***certiorari*** observed the following:

> "I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, **Gregg v. Georgia,** 428 U.S. 153, 227, 96 S.Ct. 2909, 2950, 49 L.Ed.2d 859 (1976) (BRENNAN, J., dissenting), and would therefore grant ***certiorari*** and vacate Glass' death sentence in any event. One of the reasons I adhere to this view is my belief that the "physical and mental suffering" inherent in ***any*** method of execution is so "uniquely degrading to human dignity" that, when combined with the arbitrariness by which capital punishment is imposed, the trend of enlightened opinion, and the availability of less severe penological alternatives, the death penalty is always unconstitutional. **Furman v. Georgia,** 408 U.S. 238, 287-291, 92 S.Ct. 2726, 2751-2753, 33 L.Ed.2d 346 (1972).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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CHARLES KENNETH FOSTER,
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vs.

STATE OF FLORIDA,
Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the Petition for Writ of Certiorari and Appendix have been served by U.S. Mail upon MICHAEL MOORE, SECRETARY, Department of Corrections, 2601 Blair Stone Road, Tallahassee, Florida 32399-2500; the Office of the Attorney General, Attention: RICHARD MARTELL, ASST ATTORNEY GENERAL, The Florida Capitol Building, Plaza Level One, Tallahassee, Florida 32399-1050; and The Office of the State Attorney, Bay County, Attention: ALTON PAULK, ASA, P O Box 1040, Panama City, FL 34202 this the 8th day of May, 2002.

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